Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *G. K. v. Minister of Employment and Social Development*, 2017 SSTADIS 326

Tribunal File Number: AD-17-241

BETWEEN:

G. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: July 10, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal of Canada rendered on December 20, 2016. The General Division had determined that the Applicant was ineligible for a disability pension under the *Canada Pension Plan*, as it found that his disability was not "severe" by the end of his minimum qualifying period on December 31, 2004. The Applicant filed an application requesting leave to appeal on March 20, 2017, alleging that the General Division had failed to give fair or equal consideration to each of the physicians' medical opinions.

ISSUE

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development* (DESDA) sets out the grounds of appeal as being limited to the following:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[4] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] At paragraph 45 of its decision, the General Division concluded that there was no medical evidence to show the nature or severity of the Applicant's condition before the end of his minimum qualifying period on December 31, 2004. The General Division noted that the Applicant and his wife had both testified that he refused to seek medical treatment, despite the severity of his symptoms.

[6] The Applicant suggests that, although he had failed to produce medical evidence (prepared prior to December 31, 2004) that supported a severe disability, there was nevertheless some evidence that indicated that he was already suffering from the severe effects of brittle diabetes for years before his diagnosis in 2006. In this regard, he contends that the General Division failed to consider Dr. Fowler's letter dated October 23, 2006, which noted that he was already at significant risk of amputation. He argues that Dr. Fowler's report formed the basis for Drs. Marsh and Prinsloo's opinions that he was already suffering from the severe effects of brittle diabetes for years before he was diagnosed with the disease in 2006. The Applicant submits that paragraph 58(1)(*c*) of the DESDA applies as the General Division failed to give fair or equal consideration to these physicians' medical opinions.

[7] The General Division examined the medical evidence. At paragraph 30, it referred to Dr. Fowler's consultation report of October 23, 2006 (GD2-125 and 126). Dr. Fowler saw the Applicant in relation to a diabetic foot ulcer. Dr. Fowler wrote, "I gave him a brief discussion about the need to protect his feet, as there is a significant risk of amputation."

[8] At paragraph 38, the General Division referred to Dr. Marsh's opinion of October 7, 2015 (GD3-9). Dr. Marsh wrote:

> In 2006 [the Applicant] saw a specialist plastic surgeon regarding his foot and he felt [the Applicant] was already at high risk of amputation of the leg due to these diabetic complications. **Such complications are from longstanding diabetes so although I did not see him in 2004-2005. I have every reason to believe he had medical concerns regarding his foot during this time.** (My emphasis)

[9] At paragraph 39, the General Division referred to the family physician's report dated February 25, 2016 (GD3-8). Dr. Prinsloo wrote:

> This patient already showed severe complications from his Type II diabetes in 2006, for him to be presenting with his diagnosis of diabetic gastroparesis, as well as diabetic complications affecting his right foot. He must have had severe uncontrolled diabetes symptoms during the period of 2004 and 2005.
>
> Due to these uncontrolled symptoms, this created extensive diabetic complications and this patient had an amputation of his right foot in 2013.
>
> **I therefore strongly support this patient in his claim that he had extensive symptoms and complications of his Type II diabetes during the years of 2004 and 2005. (My emphasis)**

[10] The General Division explained that it had assigned little weight to the opinions of Drs. Marsh and Prinsloo, primarily because they had not seen the Applicant until well after his minimum qualifying period had passed. In citing *Warren v. Canada (Attorney General)*, 2008 FCA 377, the General Division required some objective evidence of the Applicant's disability. In this particular case, the General Division found that "neither doctor provided evidence to support his contention that if the [Applicant] had diabetes in 2006 he must also have had diabetes in 2004." The General Division indicated that it was unable to accept "such unsupported retroactive inevitability as objective" and that "[w]ithout objective evidence, the [Applicant's] and his witness' [*sic*] testimony is simply insufficient to overcome the burden of proof."

[11] Both physicians stated the basis upon which they had formed their opinions. In Dr. Prinsloo's case, he indicated that he had come to this opinion because the Applicant was already showing severe complications and because he presented with diabetic gastroparesis. Similarly, Dr. Marsh was of the opinion that the Applicant would not be experiencing complications unless his diabetes had been longstanding. Both physicians were of the opinion that the Applicant would not have these complications or have diabetic gastroparesis unless he had already had diabetes for some time. Put another way, the complications could not have arisen in a short period; they had to have developed over an extended timeframe. In this regard, the General Division made an overly broad statement in finding that neither physician had provided any evidence to support their medical opinions. These two

physicians came to their opinions on the basis of not only the Applicant's self-reporting, but also the severity of the complications and symptoms that the Applicant exhibited by the time he saw them.

[12] However, if the appeal is to have a reasonable chance of success, I would need to be satisfied that there was some evidence that addressed the severity of the Applicant's condition by the end of his minimum qualifying period. While there was evidence before the General Division that the Applicant's diabetes was longstanding, that evidence largely did not address the issue of when the Applicant's disability might have become severe, or, if it did, it was based solely on the Applicant's own self-reporting of his symptoms. Dr. Marsh indicated that the Applicant had "medical concerns" and Dr. Prinsloo, who did not begin seeing the Applicant until 2009, was of the opinion that the Applicant had "severe uncontrolled diabetes symptoms during the period of 2004 and 2005" and that he had "extensive symptoms and complications of his Type II diabetes during the years of 2004 and 2005." There does not appear to be any basis upon which either physician could have pinpointed the onset of the severity of some of the Applicant's complications and how they affected his capacity, apart from the Applicant's own self-reporting. Even so, neither physician documented the Applicant's reported symptoms. Neither definitively stated what those symptoms were, how they might have affected the Applicant, and how they might have progressed over time.

[13] The Applicant explained that there was no medical evidence for 2004 and 2005, because he was stubborn and therefore did not seek out any medical treatment for his symptoms during those years. However, stubbornness does not lessen the requirement that the Applicant had to seek out appropriate medical investigations and treatment, particularly when he reportedly had significant symptoms during that time.

CONCLUSION

[14] Given the foregoing, the application requesting leave to appeal is refused.

Janet Lew
Member, Appeal Division